No. 83-381

*In the*

# Supreme Court of the United States

OCTOBER TERM, 1983

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**METROPOLITAN ENGINEERING COMPANY, INC., a/k/a METROPOLITAN ERECTING COMPANY, INC.,**

Petitioner,

vs.

**INRYCO, INC. and AMERICAN FIDELITY FIRE INSURANCE COMPANY,**

Respondents.

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## STATEMENT OF CASE

Respondent, Inryco, Inc. ("Inryco"),[1] submits the following statement of the case in order to correct omissions and inaccuracies in the statement of the case submitted by Petitioner, Metropolitan Engineering Company, Inc. ("Metropolitan"). The United States Court of Appeals for the Seventh Circuit affirmed the District Court's Orders denying relief under Rules 60(b) and 59(e) from a default judgment entered because of defendants' failure to comply with plaintiff's

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[1] Pursuant to Rule 28.1 of this Court, Inryco states that it is a wholly-owned subsidiary of Inland Steel Company. Inryco has no subsidiaries other than one wholly-owned subsidiary. Inryco owns no interest in any other affiliated company.

discovery requests and the District Court's Order compelling discovery, and for failure to answer the complaint.

Inryco commenced this action in May, 1980, seeking money damages for Metropolitan's breach of its subcontract with Inryco and on American Fidelity Fire Insurance Company's ("American") completion bond. Discovery requests were duly served by Inryco, but on August 27, 1980, this action was stayed on motion of Metropolitan pending arbitration of the claim. In May, 1981, Inryco sought an order lifting the stay because the defendants had not proceeded with arbitration. Defendants did not oppose that motion. Shortly after the stay was lifted on May 15, 1981, plaintiff re-served its discovery requests. Defendants made no response to the discovery requests, even though Inryco's attorneys contacted defendant's attorney, Mr. Thomas Royce, several times and received assurances that responses would be forthcoming. On August 21, 1981, Inryco filed a motion for sanctions pursuant to Rule 37(d) of the Federal Rules of Civil Procedure based upon defendant's failure to comply with discovery requests. Mr. Royce, attorney for defendants, appeared in opposition to the motion and represented to the Court that Inryco's interrogatories would be answered by September 28, 1981. Inryco's motion for sanctions was continued. Documents were not produced and interrogatories were not answered by September 28, 1981. Thereafter Inryco's continued motion for sanctions was heard by the Court no fewer than four times, even though the Court had, on the first hearing, ordered discovery to be completed by September 28. *See* Petitioner's Appendix at 40-42.

On November 13, 1981, after defendants' attorney had been served with a copy of a proposed judgment order, the Court entered an order of default against the defendants and the matter was set down for December 4, 1981 for a hearing on proof of damages. On December 4, 1981, the Court accepted the affidavits of Inryco's witnesses, who were present in open court, and a judgment order setting forth damages in favor of Inryco was entered. *See* Petitioner's Appendix at 43.

On February 10, 1982, the defendants filed a motion to vacate entry of the default order pursuant to Rule 60(b). That motion was supported by the affidavits of Mr. Royce, attorney for defendants, and Mr. James Dooley, president of Metropolitan, and subsequently by the affidavit of Mr. Clark on behalf of American. Judge Leighton issued his Memorandum Opinion dated April 13, 1982, denying the Rule 60(b) motion, and in that Memorandum Opinion he meticulously reviewed the procedural facts leading up to the entry of the default order. The Court, in its Memorandum Opinion, said that:

> The record before this court is replete with inexcusable omissions, deceits and irresponsibility. Because this court concludes that the defendants are bound by the acts and omissions of Mr. Royce, and because it concludes that the defendants could and should have been diligent in ensuring that they were indeed being defended, their motion for relief under Rule 60(b) is denied.

Petitioner's Appendix at 49. The record before the Court in the form of Mr. Dooley's affidavit specifically disclosed that Mr. Royce had contacted him concerning Inryco's discovery requests and that he knew that discovery was to be completed by July 15, 1981. Petitioner's Appendix at 66, ¶ 13. Although armed with this knowledge, he did not send documents to his attorney until September 1981, and he never provided responses to Inryco's interrogatories. The affidavit of Mr. Clark led Judge Leighton to conclude that American had turned the matter completely over to Mr. Royce and did not make significant inquiries as to the matter. *See* Petitioner's Appendix at 48.

Within ten days of the entry of the Order denying the Rule 60(b) Motion, defendants filed a Rule 59(e) Motion, in which they asserted that indeed their attorney was grossly negligent and, therefore, they should not be bound by his actions. Mr. Dooley submitted an additional affidavit in support of the Rule 59(e) Motion. *See* Petitioner's Appendix

at 80-82. Among other things, this affidavit disclosed that Mr. Dooley did not proceed with arbitration proceedings in this matter even though this action was stayed in August, 1980 at his request and for that purpose. In his second affidavit, submitted one and a half years after the stay was granted, Mr. Dooley stated that it had been his "intention to pursue the arbitration" at the conclusion of some other ill-defined litigation. Petitioner's Appendix at 81, ¶ 4. He also acknowledged that he did not contact Mr. Royce during the period that the suit was stayed, and that after he had been contacted by Mr. Royce in July, 1981, he "intended to call Mr. Royce later in January" [1982]. Petitioner's Appendix at 81–82, ¶ 7. On July 18, 1982, after its review of these additional matters submitted by defendants, the District Court reaffirmed its denial of the motion to vacate. The United States Court of Appeals for the Seventh Circuit affirmed this decision of the District Court on May 23, 1983.[2] American paid Inryco the amount of the judgment and filed an executed Satisfaction and Assignment of Judgment in the District Court on August 5, 1983.

## SUMMARY OF ARGUMENT

Metropolitan's petition for a writ of certiorari should be denied. The question presented for review by Metropolitan was expressly and properly reserved by the Court of Appeals and should not be decided by this Court. Metropolitan has not identified any important question for review, nor has it demonstrated that the decisions of the courts below conflict with decisions of other United States Courts of Appeals. Metropolitan has attempted to re-cast the facts found by the courts below into facts more favorable to it, but it has not identified a single finding which is clearly erroneous. For all of these reasons, the petition should be denied.

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[2]The opinion of the Court of Appeals has been published as *Inryco, Inc.* v. *Metropolitan Engineering Co., Inc.*, 708 F.2d 1225 (7th Cir. 1983).

## ARGUMENT

Petitioner Metropolitan has failed to demonstrate any reason for this Court to grant a writ of certiorari, including those bases set forth in Rule 17.1 of the United States Supreme Court. Therefore, the petition should be denied.

The question presented to and decided by the Court of Appeals was whether the District Court abused its discretion in this case when it declined to vacate a default judgment after finding that both defendants' counsel and the defendants themselves had been at fault in the events leading to the entry of the default order.

Contrary to Metropolitan's contention, the Court of Appeals did not decide an important question which should now be decided by this Court. The Court of Appeals expressly reserved the question which Metropolitan now seeks to have this Court decide, i.e., "whether a lawyer's grossly negligent conduct can constitute grounds to vacate a default order."[3] This question was properly reserved because both the Court of Appeals and the District Court found that Metropolitan and American were themselves neglectful in the events leading to the entry of the default order. *Id.*; District Court Opinion, Petitioner's Appendix at 53–54. Whether or not the gross negligence of counsel constitutes a proper ground for relief under Rule 60(b)(6),[4] the circumstances presented on the record below precluded such relief. Thus, the question posited as the important question for review at page 5 of Metropolitan's petition simply was not decided by the Court of Appeals in this case and should not, therefore, be submitted to this Court.

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[3] The court of appeals stated: "Finally, we reserve the issue whether a lawyer's grossly negligent conduct can constitute grounds to vacate a default judgment, for here the defendants themselves were negligent." 708 F.2d at 1232, Petitioner's Appendix at 25.

[4] Inryco continues to maintain that gross negligence of counsel is not a proper ground for relief under F. R. Civ. P. 60(b)(6).

Metropolitan's arguments essentially reduce to its assertion that the courts below made a factual error in finding that Metropolitan and American were themselves negligent in failing to attend to the litigation. Nevertheless, Metropolitan has not succeeded in identifying a single factual finding which is clearly erroneous. The District Court reviewed the facts in its first Memorandum Opinion when it passed on the request for relief under Rule 60(b). The Court made extensive findings of facts and quoted liberally from the affidavits submitted to it. *See* District Court Opinion, Petitioner's Appendix at 40-48. On the basis of the material submitted to it and after resolving all doubts in favor of Metropolitan and American, *see id.*, Petitioner's Appendix at 47, the District Court found that Metropolitan and American should have been, but were not, diligent in ensuring that they were indeed being defended. Petitioner's Appendix at 49. The Court of Appeals correctly found that the District Court committed no error in its resolution of the factual questions presented to it. *See* 708 F.2d at 1231, 1235, Petitioner's Appendix at 24, 31.

There are no conflicts in the federal courts over the principle involved in this case, namely, that a litigant who has participated in the events leading to the default judgment is not entitled to relief. *See, e.g., Dominquez* v. *United States*, 583 F.2d 615 (2d Cir. 1978) (per curiam), *cert. denied*, 439 U. S. 1117 (1979); *Ben Sager Chemicals International, Inc.* v. *E. Targosz & Co.*, 560 F.2d 805 (7th Cir. 1977); *Cliff* v. *PPX Publishing Co.*, 84 F.R.D. 369 (S.D.N.Y. 1979); *United States* v. *Payne*, 272 F. Supp. 939 (D. Conn. 1967). Metropolitan fails to demonstrate how this conclusion by the Court of Appeals is erroneous. Metropolitan's assertions that it had no reason to follow the litigation because it was entitled to rely on its attorney are misleading and fail to reflect the facts in this case. As disclosed by the affidavits of Mr. Royce and Mr. Dooley, Metropolitan was an active participant in failing to proceed with arbitration and had knowledge concerning the discovery deadlines, yet failed to respond within the time permitted under the rules. Whatever principles may apply

to the truly innocent litigant, they do not apply to Metropolitan under the facts in this case.

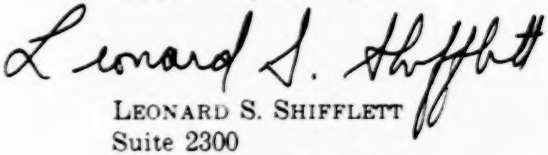
Similarly, Metropolitan cannot rely on unsupported assertions that it was "misled" by its attorney. The affidavits of James Dooley, Metropolitan's president, do not disclose a single instance of Metropolitan's being misled by its attorney.

Metropolitan has not presented specific allegations of factual error. This Court has indicated that it will not reexamine the record when the two courts below have, as they did in this case, agreed on the facts. *See Boehmer* v. *Pennsylvania Railroad Co.*, 252 U. S. 496, 498 (1920). Metropolitan has not presented any question which should be decided by this Court.

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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